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No. 06-1271

# In the Supreme Court of the United States

PAUL A. HEINRICH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the wetlands at issue in this case, which are adjacent to a permanent lake that flows through perennial streams to traditional navigable waters, are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(7), 86 Stat. 886, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA); 33 U.S.C. 1362(7).

2. Whether the district court had subject-matter jurisdiction over this civil enforcement action brought by the United States under the CWA.

3. Whether the application of the CWA to the wetlands at issue in this case is a permissible exercise of congressional power under the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution.

4. Whether petitioner received adequate notice of his obligation to obtain a state water quality certification in order to qualify for coverage under Nationwide Permit 26.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 184 Fed. Appx. 542. The opinion of the district court (Pet. App. 25a-42a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 6, 2006. A petition for rehearing was denied on December 18, 2006 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on March 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution

Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The government alleged that petitioner had discharged fill material into "the waters of the United States," see 33 U.S.C. 1362(7), without a permit, in violation of 33 U.S.C. 1311(a) and 1344. The district court granted the government's motion for summary judgment on liability, holding that petitioner's unpermitted discharges violated the CWA. Pet. App. 25a-42a. After a trial to determine the appropriate sanction, the district court ordered petitioner to restore the wetlands and to pay a civil penalty of $75,000. *Id.* at 7a-9a. The court of appeals affirmed. *Id.* at 1a-6a.

1. a. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States."

See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

b. The CWA authorizes the Corps to issue general permits on a state, regional, or nationwide basis for activities that meet specified criteria. 33 U.S.C. 1344(e). The Act provides that any applicant for a CWA permit must obtain and provide to the Corps a certification from the relevant State that the proposed discharge will comply with state water quality standards. 33 U.S.C. 1341(a)(1). If a State fails to act on a certification request within a reasonable period of time, not to exceed one year, after receipt of the request, the applicant's obligation to provide the Corps with such certification is waived. *Ibid.*

Activities authorized by a nationwide permit (NWP) may generally proceed without further Corps approval once all terms and conditions for the permit have been met. 33 C.F.R. 330.2(c) and (h); see 33 C.F.R. 330.1(b). A discharge covered by an NWP is lawful, however, only

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3(a), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

if the person who undertakes the discharge has obtained a state water quality certification or waiver. 33 C.F.R. 330.4(b)(2) and (c)(2). For an NWP, a State may issue a general water quality certification with special conditions. The Corps in turn may incorporate the State's conditions as regional conditions of the NWP. 33 C.F.R. 330.4(c)(2). If the Corps finds the State's conditions to be inconsistent with 33 C.F.R. 325.4, however, the State's "conditioned * * * water quality certification will be considered a denial of the certification" for the NWP. 33 C.F.R. 330.4(c)(2). In that event, a person who seeks to discharge pollutants into "waters of the United States" must obtain an individual water quality certification from the State pursuant to Section 401 of the CWA, 33 U.S.C. 1341, in order to rely on the NWP. 33 C.F.R. 330.4(c)(3).

At the times relevant to this enforcement action, Corps regulations established a nationwide permit known as NWP 26. That NWP, which was subject to the state water quality certification requirement, authorized discharges of dredged or fill material into headwaters of other waters of the United States provided that the discharge caused a loss to waters of the United States of three acres or less. See 61 Fed. Reg. 65,916-65,917, 65,920 (1996).

c. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.*

v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to actual or proposed pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such

water bodies, *id.* at 2227.[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

2. Petitioner is an attorney and licensed pilot who owns a 9.5-acre tract containing eight acres of white cedar swamp adjacent to Little Star Lake in northern Wisconsin. Pet. App. 2a, 5a, 26a. Petitioner owned and operated a seaplane tour business, using the property to store his seaplane and using the lake to take off and land the plane. *Id.* at 26a. Little Star Lake is also used for recreational fishing, boating, and snowmobiling, including by visitors to a year-round resort that operates on the lake. *Ibid.*

In 1996, petitioner sought to construct a road that would serve as a seaplane taxiway leading from the lake through the swamp to a hangar on the site. Pet. App.

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

26a. When the Wisconsin Department of Natural Resources (WDNR) and the Corps learned of petitioner's plans, the agencies informed him that he was unlikely to obtain the necessary state water quality certification and Corps permit for a seaplane access road. *Ibid.* When petitioner told those agencies that he instead planned to construct a "logging road" exempt from the permitting requirements of the CWA, see 33 U.S.C. 1344(f)(1)(E), the Corps and WDNR advised him on several occasions that the project would not be exempt. Pet. App. 27a.

Petitioner nevertheless proceeded with the road-building project without obtaining the requisite permits. Pet. App. 27a-28a. When the Corps learned of the road's existence, it referred the matter to EPA. Decl. of Michael F. O'Keefe, para. 36 (Dkt. No. 32); see Pet. App. 2a. EPA subsequently "issued an administrative compliance order requiring [petitioner] to cease all discharges of fill and to submit a plan to restore the wetlands," but petitioner "denied that any permit was required and refused to restore the property to its former state." *Id.* at 28a.

3. The United States subsequently filed suit in federal district court, alleging that petitioner had violated the CWA by filling wetlands on his property without a permit. Pet. App. 2a, 28a. The district court granted the government's motion for summary judgment with respect to liability. *Id.* at 25a-42a. The court found that petitioner had discharged a pollutant into "waters of the United States" covered by the CWA. *Id.* at 30a-33a. The district court further held that those discharges were unlawful because (1) in light of the purpose of the road and the manner of its construction, petitioner's road did not qualify for the CWA's forest road exemp-

tion from the permit requirement, *id.* at 34a-36a; and (2) petitioner's pollutant discharges were not authorized by NWP 26 because petitioner had failed to obtain a state water quality certification, *id.* at 36a-39a. The district court subsequently imposed a $75,000 civil penalty and ordered petitioner to fully restore the wetlands. *Id.* at 2a, 7a-22a.

4. The court of appeals affirmed. Pet. App. 1a-6a.

a. Petitioner contended that the pollutant discharges associated with his road-building activities were covered by NWP 26 because the State of Wisconsin had "waived its right to require water quality certification for NWP 26 projects." Pet. App. 3a. The court of appeals rejected that contention. *Id.* at 3a-4a. The court explained that, "[i]f a state denies blanket water quality certification for a particular NWP, or if the Corps deems the conditions imposed by a state to be the equivalent of a denial, then individuals seeking to proceed under a NWP must obtain individual water quality certifications." *Id.* at 3a. After examining the course of dealings between federal and state officials, the court found that Wisconsin had not waived its right to issue a state water quality certification for NWP 26, and that the Corps had treated the conditions imposed by the State as a denial of NWP certification. *Id.* at 3a-4a. For that reason, the court concluded, "each applicant seeking to use NWP 26 in" Wisconsin was required "to obtain an individual state water quality certification." *Id.* at 4a.

b. Petitioner further contended that the requirement of an individual water quality certification could not properly be applied to him because the Corps had failed to provide adequate public notice that it construed the conditions imposed by the State as a denial of blanket certification for NWP 26. Pet. App. 4a. The court of

appeals rejected that argument. *Id.* at 4a-5a. The court explained that

> the regulations *are* clear that an individual water quality certification is required where a state has denied blanket certification under a particular NWP. 33 C.F.R. § 330.4(c)(6). Nowhere do the regulations indicate that landowners are entitled to assume that blanket certification is in effect unless they're specifically told otherwise. Yet [petitioner] * * * seems to assume that he had a legal right to go forward with his access road simply because no one ever told him he couldn't.

*Id.* at 5a. The court concluded that petitioner "should have read the appropriate regulations more carefully and inquired about the status of state water quality certification requirements before he cavalierly moved forward with his project." *Ibid.*

c. Thirteen days after the court of appeals' ruling, this Court issued its decision in *Rapanos*. Petitioner sought rehearing or rehearing en banc, arguing that the case should be remanded to the district court to determine whether, under *Rapanos*, the wetlands into which he discharged fill were "waters of the United States" within the meaning of the CWA. The court of appeals denied the petition. Pet. App. 43a-44a; see Pet. 8.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 17-24) that the wetlands at issue in this case are not "waters of the United States" within the meaning of the CWA. That argument

was not preserved in the court below, and it lacks merit in any event.

a. Petitioner did not argue before the court of appeals panel that his wetlands were outside the coverage of the CWA, see Pet. 18 n.8, and the court did not address the question. Although petitioner raised his current challenge in a petition for panel rehearing with suggestion for rehearing en banc, that filing was insufficient to preserve the claim under established Seventh Circuit practice. See, *e.g.*, *Indiana Gas Co.* v. *Home Ins. Co.*, 141 F.3d 314, 321 (7th Cir.) (opinion denying reh'g) ("An argument made for the first time in a petition for rehearing has been forfeited."), cert. denied, 525 U.S. 931 (1998). This Court typically declines to address issues that were neither timely presented to nor decided by the court below. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was "inadequately preserved in the prior proceedings"); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

b. Petitioner argues (Pet. 21-22) that his failure to raise this issue in the Seventh Circuit may be excused because the challenge goes to the subject-matter jurisdiction of the district court and therefore may be advanced at any stage of the litigation. Even if petitioner were correct in characterizing the question of CWA coverage as one of subject-matter jurisdiction, the absence of any analysis of the issue by the court of appeals would weigh substantially against a grant of certiorari. In any event, the question whether petitioner's wetlands were encompassed by the CWA term "waters of the United States" goes to the merits of the government's enforce-

ment action, not to the district court's jurisdiction to decide the case.

Under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (jurisdiction over suits brought by United States as plaintiff), the district court had ample statutory authority to adjudicate the government's suit. In order to obtain either monetary or injunctive relief, the government was required to prove that petitioner's wetlands fell within "the waters of the United States" as that phrase has been construed in this Court's precedents. But if the government had failed to carry its burden on that point, the proper disposition of the suit would have been a ruling for petitioner on the merits rather than a dismissal for lack of jurisdiction. See *United States* v. *Krilich*, 209 F.3d 968, 972 (7th Cir.) (explaining, in comparable circumstances, that the relevant "interstate connection, *i.e.*, that the waters involved were 'waters of the United States,' is merely an element of the United States' Clean Water Act case under section 301; subject matter jurisdiction over this question comes from 28 U.S.C. § 1331"), cert. denied, 531 U.S. 992 (2000); cf. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 503 (2006) (distinguishing between the district court's "'subject-matter' jurisdiction over a controversy" and "the essential ingredients of a federal claim for relief").[3]

[3] Petitioners' reliance (Pet. 22) on *United States* v. *Hartsell*, 127 F.3d 343 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998), is misplaced. The defendants/appellants in *Hartsell* were convicted of criminal CWA violations based on their discharges of pollutants into a public sewer system. See 127 F.3d at 347-348. They argued, inter alia, that "the district court lacked subject matter jurisdiction in the instant case" because their discharges were not properly subject to federal regulation. *Id.* at 348. The court of appeals rejected that argument, holding that "the CWA clearly provides for regulation of discharges into public sewer systems," and that "Congress has the constitutional authority to"

c. Even if petitioners' contention that the CWA does not cover his wetlands had been properly preserved in the court of appeals, the issue would not warrant this Court's review. Based on the undisputed record evidence in this case, petitioner's wetlands would be treated as part of the "waters of the United States" under the interpretive approaches taken by at least eight Members of this Court in *Rapanos*. That evidence establishes that petitioner's wetlands have a continuous surface connection with Little Star Lake, which is connected by a series of perennial streams and lakes to the Wisconsin River, a traditional navigable water that flows into the Mississippi River. See Decl. of Byron "Dale" Simon, paras. 31-38 (Dkt. No. 34). Consistent with that evidence, the district court explained that the wetlands "slope[] toward and [are] hydrologically connected to Little Star Lake. Little Star Lake * * * is connected by surface water and drains into Star Lake and ultimately into the Wisconsin and Mississippi Rivers." Pet. App. 26a.[4]

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regulate such discharges. *Ibid.* The court concluded that the defendants "are unable to persuade us that either Congress, in passing the CWA, or the district court, in hearing the criminal case against the appellants, acted beyond its powers." *Id.* at 349. Although the court of appeals did not specifically reject the defendants' contention that their challenge went to the subject-matter jurisdiction of the district court, neither did it endorse that characterization, and the court's disposition of the case did not turn on whether the disputed issue was one of subject-matter jurisdiction.

[4] Relying on 33 U.S.C. 59aa, petitioner contends (Pet. 10 & n. 3) that the Wisconsin River is not a "navigable" waterway for purposes of the CWA. Petitioner's reliance on Section 59aa is misplaced. Section 59aa states that a portion of the Wisconsin River "is hereby declared to be a nonnavigable waterway of the United States for purposes of title 46, * * * and the other maritime laws of the United States." Section 59aa

The four-Justice plurality in *Rapanos* concluded that the CWA term "waters of the United States" encompasses wetlands having a "continuous surface connection," 126 S. Ct. at 2227, to "relatively permanent, standing or continuously flowing bodies of water," *id.* at 2225, that are connected to traditional navigable waters, *id.* at 2226-2227. Under that approach, the wetlands at issue in this case are part of the "waters of the United States." The four Justices who dissented in *Rapanos* stated that they would sustain the exercise of federal regulatory jurisdiction under the CWA in *all* cases in which either the plurality's or Justice Kennedy's standard for CWA coverage is satisfied. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting). Petitioner's wetlands thus would be treated as part of the "waters of the United States" under the interpretive approaches adopted by at least eight Members of this Court.[5]

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does not address the river's status under the CWA. In any event, the Wisconsin River is a tributary of the Mississippi River, which petitioner does not dispute is a traditional navigable water.

[5] Under *Rapanos*, the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the Corps' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks* v. *United States*, 430 U.S. 188 (1977), as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, No. 05-11284 (Apr. 25, 2007), slip op. 18 n.15, 23 (analyzing concurring and dissenting opinions in a prior case to

d. Petitioner contends (Pet. 18-19) that the circuits are divided with respect to the standard to be used in identifying "the waters of the United States" in light of the various opinions in *Rapanos*. Because the record in this case makes clear that petitioner's wetlands are covered by the CWA under the *Rapanos* plurality's standard, the only issue that could potentially affect the outcome of this case is whether the CWA term "waters of the United States" encompasses wetlands that satisfy the plurality's standard but do not satisfy Justice Kennedy's "significant nexus" standard. Even if that question otherwise warranted this Court's review, the instant case would be an unsuitable vehicle to decide it, since petitioner did not properly preserve his challenge to CWA coverage in the court of appeals and that court did not address the issue. In any event, no square circuit conflict exists.

In *United States* v. *Johnson*, 467 F.3d 56, 60-66 (1st Cir. 2006), the court of appeals agreed with the government (see note 5, *supra*) that the CWA term "waters of the United States" encompasses all wetlands that satisfy

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identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

Here, both of the courts below issued their decisions before this Court's ruling in *Rapanos*, and petitioner did not argue in the court of appeals that his wetlands fell outside the CWA's coverage. For those reasons, neither the court of appeals nor the district court had occasion to discuss the application of Justice Kennedy's "significant nexus" standard. Because the record makes clear that the wetlands would be treated as part of "the waters of the United States" under the standards endorsed by at least eight Members of this Court in *Rapanos*, petitioner's discharges were covered by the CWA regardless of whether the "significant nexus" standard would also be satisfied.

either the plurality's standard or that of Justice Kennedy. The court observed that, if the term were read to exclude wetlands that satisfy the plurality's standard but not Justice Kennedy's, "there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation." *Id.* at 64.

In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), petition for cert. pending, No. 06-1331 (filed April 2, 2007), the court remanded the case for further proceedings in light of *Rapanos* and stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case.

In *Northern California River Watch* v. *City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006), the court stated that Justice Kennedy's concurring opinion in *Rapanos* "provides the controlling rule of law." As in *Gerke*, however, the court did not specifically discuss the proper resolution of a coverage dispute involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue were covered by the CWA. See *id.* at 1030-1031. Moreover, a petition for rehearing with respect to the proper application of *Rapanos* is currently

pending before the court of appeals in that case, so it is possible that the Ninth Circuit will revise its analysis. Because no court of appeals has rejected a claim of CWA coverage in a case involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's, questions concerning the proper disposition of such a case do not currently warrant this Court's review.

e. Petitioner contends (Pet. 23-24) that the application of the CWA to his wetlands would exceed Congress's power under the Commerce Clause. That claim lacks merit. In articulating a definition of the term "waters of the United States" that was narrower than the definition reflected in the Corps and EPA regulations, the *Rapanos* plurality expressed reluctance "to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." 126 S. Ct. at 2224. Because the *Rapanos* plurality invoked principles of constitutional avoidance as a factor supporting its construction of the disputed statutory language, the clear import of its opinion is that protection of wetlands encompassed by the plurality's standard falls comfortably within Congress's commerce power. The four dissenting justices expressed the view that even the Corps' broader approach to CWA coverage raised no substantial constitutional concern. See *id.* at 2261-2262 (Stevens, J., dissenting). Thus, at least eight Justices in *Rapanos* agreed that the CWA is constitutional as applied to wetlands that satisfy the plurality's standard for coverage under the Act.[6]

2. Petitioner contends (Pet. 25-28) that the application of the CWA to his wetlands violated his rights under

[6] Justice Kennedy likewise expressed the view that his own interpretation of the CWA "does not raise federalism or Commerce Clause concerns." 126 S. Ct. at 2249 (Kennedy, J., concurring).

the Due Process Clause because he did not receive adequate notice that he was required to obtain an individual water quality certification from Wisconsin before proceeding with his road-building project. That claim was not properly preserved below and in any event lacks merit.

a. Although petitioner argued in the courts below that he had received inadequate notice of the need for an individual state water quality certification, he did not identify the Due Process Clause as the basis for his claim until the petition for a writ of certiorari. See Pet. 25 n.9. The court of appeals explained (see Pet. App. 4a-5a) why petitioner had received all the notice to which he was entitled under the applicable regulations, but it had no occasion to decide whether additional notice was required by the Fifth Amendment. The absence of any analysis of the relevant constitutional precedents by the courts below would hinder any effort by this Court to decide petitioner's current Due Process Clause claim. Petitioner's prior failure to frame his challenge in constitutional terms is an independently sufficient reason for this Court to deny review.

b. Section 401(a)(1) of the CWA unambiguously requires applicants for discharge permits under the Act to provide a state water quality certification to the permitting agency. 33 U.S.C. 1341(a)(1). Agency officials had repeatedly told petitioner that the discharge of fill into the wetland without a state water quality certification would be unlawful. Pet. App. 27a. Even when a particular discharge is covered by an NWP, the Corps' regulations provide clear notice "that an individual water quality certification is required where a state has denied blanket certification under a particular NWP." *Id.* at 5a (citing 33 C.F.R. 330.4(c)(6)).

Petitioner also contends (Pet. 26-27) that the Corps was required to provide public notice that it had construed the conditions imposed by Wisconsin as a denial of blanket certification for NWP 26. As the court of appeals explained, however, the applicable regulations do not "indicate that landowners are entitled to assume that blanket certification is in effect unless they're specifically told otherwise." Pet. App. 5a. If petitioner intended to rely on NWP 26, he could and should have contacted agency personnel to ascertain the status of the State's water quality certification. *Ibid.*; cf. 33 C.F.R. 330.4(a) ("It is important to remember that the NWPs only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required."). Petitioner had ample notice of the need to investigate and comply with water quality certification requirements, and ample access to agency officials who could assist him in that endeavor. Petitioner cites no authority suggesting that the Due Process Clause required the Corps to announce in some more public way that it viewed the State's conditions as a denial of blanket certification for NWP 26.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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